APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 149-55

(Decided January 31, 1956)

EARLE ROBERT BALL, THE HEIRS OF JOHN S. BECKER, DECEASED: EUGENE C. CALLAHAN, EVERETT T. CROSSAN, ROBERT J. DEEGAN, CHARLES S. FLIPPEN, JOHN GALVIN, WILLIE A. HOPKINS, WILLIAM E. MASON, CHARLES MONTINI, JOHN T. MOYER, HARRY J. MURRAY, RAYMOND JOHN REILLY, LOUIS R. SHIELDS, CHARLES E. WEIR

v.

THE UNITED STATES

Mr. Samuel I. Sherwood for the plaintiffs.

Mr. LeRoy Southmayd, Jr., with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant.

ON DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' PETITION

LARAMORE, *Judge*, delivered the opinion of the court:

Plaintiffs, all honorably discharged veterans of the Armed Forces of the United States entitled to rights conferred by the Veterans' Preference Act of 1944, 58 Stat. 378, 390, as amended, 61 Stat. 723, are employed by the Department of the Navy at the Philadelphia Naval Shipyard.

On January 5, 1948, all plaintiffs, except Eugene C. Callahan, were reduced in rank, grade, and salary from their leadingman positions to various journeyman positions. On November 1, 1948, all plaintiffs, except Callahan, were re-

stored to their former ranks, grades, and salaries pursuant to a temporary mandatory injunction issued by the U. S. District Court for the Eastern District of Pennsylvania. The District Court, on October 25, 1948, had held that they had been "unlawfully reduced" in grade. Plaintiff Callahan was reduced in grade on September 8, 1947, and was restored by order of the same District Court on July 14, 1948, for the same reason.

Plaintiffs seek by their petition filed April 8, 1955, to recover pay allegedly due them from the United States as a result of their alleged illegal reduction in grade.

On April 21, 1955, defendant filed a motion for an order dismissing the petition on the ground that this court does not have jurisdiction of the claims stated therein, since it appears on the face of the petition that the claims accrued more than six years prior to the filing of the petition and are accordingly barred by the statute of limitations, 28 U. S. C. § 2501, which provides in part:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, * * * within six years after such claim first accrues.

In order to determine whether or not a claim is barred by the running of the applicable statute of limitations, it is first necessary to decide when the cause of action on the claim first accrued. Plaintiffs contend that the cause of action sued on did not accrue until final disposition of their cases in the U. S. District Court in 1954. Plaintiffs also contend that in any event the statute of limitations must have been tolled during the pendency of the suits in the District Court because until that time plaintiffs were denied access to the Court of Claims by virtue of 28 U. S. C. § 1500,[1] citing *Oerlikon Machine Tool Works, et*

[1] "The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States."

al. v. United States, 121 C. Cls. 616. Defendant contends that the cause of action sued on herein accrued in the case of each plaintiff on the date of the wrongful demotion which, admittedly, occurred more than six years prior to the filing of the petition.

A cause of action arises from an invasion of a right or a violation of a duty or obligation. *Travelers Fire Ins. Co. v. Rainey-Davis Mercantile Co., etc.*, 173 F. 2d 844. A cause of action accrues for purposes of the statute of limitations when a suit may first be legally instituted thereon, *i.e.*, when all the events have occurred which fix the liability of the United States to a claimant and which entitle the claimant to sue thereon. *Sese v. United States*, 125 C. Cls. 526; *Group v. United States*, 125 C. Cls. 135; *Reliance Motors Inc. v. United States*, 112 C. Cls. 324. Plaintiffs herein allege that they are entitled to recover under the provisos of the Veterans' Preference Act of June 27, 1944, 58 Stat. 390, as amended by the Act of August 4, 1947, 61 Stat. 723, 5 U. S. C. (Supp. V) § 863. Before a cause of action may be said to have accrued under a statute, it must appear that all the statutory requirements have been met. *Sanderson v. Postal Life Ins. Co.*, 72 F. 2d 894, 897. The Act of June 27, 1944, prior to the 1947 amendment, provided that no preference eligible should be reduced in rank or compensation except for such cause as would promote the efficiency of the service; that the veteran should have the right to appeal in person to the Civil Service Commission from an adverse decision of the administrative officer; and that the Civil Service Commission should submit its findings and recommendations to the proper administrative officer. In the case of *Stringer v. United States*, 117 C. Cls. 30, we held that failure of the Government to comply with the procedural rights accorded the plaintiff under that statute, gave rise to a cause of action for pay lost on account of wrongful demotion from the date of such demotion to the date of judgment, *Stringer* not having been reinstated to

his proper rank. Although the plaintiffs herein have not alleged in what manner their reductions in grade were in violation of the 1944 Veterans' Preference Act, they have alleged that the demotions were "illegal" and for the purposes of this motion we will assume that the provisions of the act were not complied with. Accordingly, plaintiffs have stated a cause of action within the meaning of the 1944 act. From all that appears, however, that cause of action was complete when the demotions took place, and plaintiffs were entitled to sue thereon at that time. Plaintiffs, however, did not elect to bring suit for lost pay at that time, but commenced action in the District Court against individual Government officials to secure reinstatement to their proper grades, and such reinstatements were finally ordered and made pursuant to a temporary mandatory injunction of the District Court as noted above. The Government officials appealed from the District Court order and in the case of *Hopkins, et al.* v. *Wallin, et al.*, 179 F. 2d 136 (1949), the temporary injunction of the District Court was vacated and the cause remanded to the District Court for further proceedings. In 1954 the cause was finally dismissed in the District Court for lack of prosecution.

It is plaintiffs' position that their cause of action under the Veterans' Preference Act, *supra*, as amended by the Act of August 4, 1947, did not accrue until the reinstatement proceedings in the District Court were finally terminated in 1954. The 1947 amendment to the Veterans' Preference Act of 1944 contains the following additional provision:

> * * * and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: * * *

In *Goodwin* v. *United States*, 127 C. Cls. 449, we held that the mandatory recommendation of the Civil Service Commission to reinstate in the case of a veteran demoted in

violation of the provisions of the Veterans' Preference Act, *supra*, created a statutory claim against the employing agency for the back pay lost during the period of demotion; that the claim under that statutory provision arose when the mandatory recommendation of the Commission was issued; and that suit brought two months thereafter was timely, although more than six years had elapsed since the actual demotion took place. It does not appear that the instant plaintiffs have brought themselves within the ruling in the *Goodwin* case, since the order relied on by them is an order of the District Court rather than of the Civil Service Commission, as provided in the 1947 amendment to the Veterans' Preference Act, *supra*. Accordingly, no new cause of action accrued by virtue of the District Court order whenever it was final.

In the case of *Carl P. Green* v. *United States*, 124 C. Cls. 186, we held that plaintiff's right of action under the Act of June 10, 1948, 62 Stat. 354 (amending the Lloyd-La Follette Act of August 12, 1912), 28 U. S. C. § 652 (b) (3), for pay lost through wrongful *discharge*, accrued upon his restoration to duty pursuant to a *final* mandatory injunction of the District Court, noting that the time to appeal therefrom had expired. This case does not help plaintiffs herein, however, since in *Gregory* v. *United States*, 123 C. Cls. 794, we held that section 652 of the 1948 act did not apply to demotions but only to discharges.

We have held that failure to pursue administrative remedies not required by the statute does not prevent a cause of action from accruing thereunder, *Cuiffo* v. *United States*, 131 C. Cls. 60. We have also held that the pendency of administrative proceedings not required by the statute under which suit is brought does not serve to toll the statute of limitations. *Gray* v. *United States*, 124 C. Cls. 313; *McCormick* v. *United States*, 124 C. Cls. 111; *Thomas* v. *United States*, 125 C. Cls. 76. Had the instant plaintiffs not been reinstated in their proper grades by order of

the District Court, such circumstance would not have prevented their causes of action from accruing under the 1944 Veterans' Preference Act (before amendment) on the date of their illegal demotions. *Stringer* v. *United States*, *supra*.

But plaintiffs urge that because of the operation of section 1500 of the Judicial Code (28 U. S. C. § 1500), they were absolutely barred from bringing suit in this court, and that as long as access to the court was thus denied them, the statute of limitations applicable to suits in the Court of Claims is tolled.

Assuming that section 1500 would have prevented plaintiffs from maintaining their suits against the Government for back salary in the Court of Claims while their suits for specific relief against individual Government officials were pending in the Federal District Court, a point which we do not decide, we do not think that the statute of limitations was tolled while plaintiffs' suits in the District Court were still pending. Prior to the commencement of the District Court suits against individual Government officials, plaintiffs had a completely accrued cause of action for pay against the Government itself on which they might have then brought suit in the Court of Claims. Plaintiffs' right to recover on the salary claims was in no way dependent upon a final judgment in reinstatement proceeding. In *Creson* v. *Scott*, 275 S. W. 2d 406, the Kentucky court held that where plaintiff's claim was in no way dependent upon a judgment in a suit pending in another court, the pendency of that other litigation did not serve to toll the statute of limitations. In *Brunswick Land Corp.* v. *Perkinson*, 153 Va. Rep. 603, 151 S. E. 138, the Virginia court held that the pendency of an independent proceeding between the parties involving a cognate question did not serve to frustrate the plea of the statute of limitations after the lapse of the prescribed period. In that case the plaintiff had waited more than the applicable statutory period to file a suit for trespass to land. In re-

sponse to the defense of the statute of limitations, plaintiff urged that the statute was tolled while he was seeking judgment in another proceeding against the same party to determine the actual boundary between their lands and to have the strip on which the alleged trespass occurred awarded to plaintiff. The court held that while the suit to try title or right of possession was related to the suit for damages for trespass, the two suits concerned distinct and independent causes of action, and the pendency of one did not serve to toll the statute of limitations on the other. See also *In re H. L. Herbert & Co.* (C. C. A. 2d 1919), 262 F. 682. In *Flagan* v. *United States*, 101 C. Cls. 294, cert. denied, 233 U. S. 763, plaintiff sued for pay for a period of wrongful demotion and also for a subsequent period of wrongful removal from his position with the Government. The petition in the Court of Claims was filed more than six years from the alleged illegal acts of the Government, but within two years of a final order of the District Court dismissing proceedings brought therein by plaintiff against a Government official to secure reinstatement. Plaintiff contended that the statute of limitations did not commence to run on his suit in the Court of Claims until final action had been taken in his District Court proceedings. The Court rejected this contention and dismissed the petition holding that the statute of limitations was not tolled by the failure of other supposed remedies. In *Lowry, et al.* v. *United States*, 125 C. Cls. 598, plaintiffs brought suit for overtime pay alleged to be due them by reason of their employment by the War Department as civilian firefighters during the period between December 1, 1942, and December 31, 1944. The petition was filed in this court on September 29, 1952. In response to defendant's plea of the statute of limitations, plaintiffs urged that the statute of limitations did not commence to run on their claims until suits on the very same pay claims pending in the Federal District Court were dismissed following the decision of the Supreme Court in *Brunez* v. *United States*, 343 U. S.

112. The Court of Claims dismissed the petitions, noting that at the time plaintiffs had filed their petitions in the District Court, that court and the Court of Claims had concurrent jurisdiction in pay cases of Government "employees" and that plaintiffs had apparently *elected* to bring suit in the District Court in the hope of more favorable treatment on their claims than they would have received in the Court of Claims because of this court's decision in the case of *Coan* v. *United States*, 107 C. Cls. 422, cert. denied, 332 U. S. 757. [The court held that the statute of limitations was not tolled, nor did the 1951 statute (Act of June 25, 1948, 62 Stat. 640), depriving the District Court of jurisdiction over plaintiff's cause of action, serve to create a new period of limitations.] (Sentence in brackets deleted by order of the Court of Claims March 7, 1956.)

Plaintiffs' reliance on the cases holding that a state of war which closes the court to a particular plaintiff tolls the statute of limitations, while access to the court is thus denied plaintiff, is misplaced. In the case of *Marcos* v. *United States*, 122 C. Cls. 641, the court discussed at some length the reasons why the statute of limitations is tolled by war, and none of those reasons exist in a case like this where plaintiffs might have brought suit for pay in the Court of Claims when their causes of action accrued, but elected to seek reinstatement in the District Court by suits against the Government officials responsible for their demotion.

We conclude that plaintiffs have stated but one cause of action which accrued and might have been sued upon in this court at the time of the demotions complained of. No additional cause of action accrued to these plaintiffs by virtue of their subsequent reinstatement, and the pendency of their District Court proceedings in the reinstatement matter did not toll the running of the statute of limitations on their causes of action for pay in the Court of

Claims, despite the fact that the pendency of such District Court proceedings might have deprived this court of jurisdiction of the pay claims. Since plaintiffs' petition was not timely filed, it must be dismissed.

It is so ordered.

MADDEN, *Judge*; WHITAKER, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

SUPREME COURT OF THE UNITED STATES

No.

October Term, 1955

EARLE ROBERT BALL, *et al.*

v.

THE UNITED STATES

Order Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 29th, 1956, provided the time has not expired.

/s/ EARL WARREN
Chief Justice of the United States.

Dated this 30th
day of April, 1956

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No.

EARLE ROBERT BALL, ET AL., *Petitioners*

vs.

THE UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s).

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 1st, 1956.

/s EARL WARREN
Chief Justice of the United States.

Dated this 29th day of May, 1956

STATUTES INVOLVED

5 U.S.C. 863:

> "No permanent or indefinite preference eligible . . . employed in the civil service . . . shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, . . . except for such cause as will promote the efficiency of the service . . .; such preference eligible . . . shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer . . .".

5 U.S.C. 652(b)(3):

> "Any person removed or suspended without pay in a reduction in force, who, after appeal to proper authority, is reinstated . . . shall be paid compensation at

the rate received on the date of such removal . . . for the period for which he received no compensation . . ."

28 U.S.C. 1491:

". . . The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States, that is, . . . (2) Founded upon any act of Congress, or (3) Founded upon any regulation of an executive department . . . ".

28 U.S.C. 1346(d)(2):

"The District Courts shall not have jurisdiction under this section of any civil action to recover fees, salary or compensation for official services of officers or employees of the United States."

28 U.S.C. 2501:

"Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed . . . within six years after such claim first accrues."

28 U.S.C. 1500:

"The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff . . . has pending in any other court any suit . . . against the United States or any person who, . . . was, in respect thereto acting or professing to act, directly or indirectly under the authority of the United States."